

direct labor as its base, plus the concern's General and Administrative rate multiplied by the labor cost.

(3) *Cost of manufacturing.* Those costs incurred by the firm in the production of the end item being acquired. These are costs associated with the manufacturing process, including the direct costs of fabrication, assembly, or other production activities, and indirect costs which are allocable and allowable. The cost of materials, as well as the profit or fee from the contract, are excluded.

(4) *Cost of materials.* Includes costs of the items purchased, handling and associated shipping costs for the purchased items (which includes raw materials), off-the-shelf items (and similar proportionately high-cost common supply items requiring additional manufacturing or incorporation to become end items), special tooling, special testing equipment, and construction equipment purchased for and required to perform on the contract. In the case of a supply contract, the acquisition of services or products from outside sources following normal commercial practices within the industry are also included. In addition, where the services of a public or private utility company are obtained for the lease and use of distribution facilities such as telecommunications circuits, petroleum or natural gas pipelines, or electric transmission lines in connection with the performance of a contract, the acquisition of those services will also be considered as cost of materials.

(5) *Off-the-shelf item.* An item produced and placed in stock by a manufacturer, or stocked by a distributor, before orders or contracts are received for its sale. The item may be commercial or may be produced to military or Federal specifications or description. Off-the-shelf items are also known as Nondevelopmental Items (NDI).

(6) *Personnel.* Individuals who are "employees" under § 121.106 of this title.

(7) *Subcontracting.* That portion of the contract performed by a firm, other than the concern awarded the contract, under a second contract, purchase order, or agreement for any parts, supplies, components, or subassemblies which are not available off-the-shelf, and which are manufactured in accordance with drawings, specifications, or designs furnished by the contractor, or by the government as a portion of the solicitation. Raw castings, forgings, and moldings are considered as materials, not as subcontracting costs. Where the prime contractor has been directed by the

Government to use any specific source for parts, supplies, components subassemblies or services, the costs associated with those purchases will be considered as part of the cost of materials, not subcontracting costs.

(c) SBA will determine compliance with the Prime Contractor Performance Requirements (Requirements) as of the following dates:

(1) In a sealed bid procurement, as of the date the bid was submitted;

(2) In a negotiated procurement, as of the date the concern submits its best and final offer. If a concern is determined not to be in compliance at the time it submits its best and final offer, it may not come into compliance later for that procurement by revising its subcontracting plan.

(d) The Requirements will be considered an element of responsibility and not a component of size eligibility.

(e) The base contract period (excluding any options) will be used to determine compliance with the Requirements.

(f) Work to be performed by subsidiaries or other affiliates of a concern is not counted as being performed by the concern for purposes of determining whether the concern will perform the required percentage of work.

(g) The procedures of § 125.5 apply where the contracting officer determines non-compliance with the requirements applicable to small business set-aside or SDB-related procurements, and refers the matter to SBA for a COC determination.

Dated: November 11, 1995.

Philip Lader,

Administrator.

[FR Doc. 95-28515 Filed 11-24-95; 8:45 am]

BILLING CODE 8025-01-P

### 13 CFR Parts 132 and 134

#### Rules of Procedure Governing Cases Before the Office of Hearings and Appeals

**AGENCY:** Small Business Administration.  
**ACTION:** Proposed rule.

**SUMMARY:** In response to President Clinton's government-wide regulatory reform initiative, the Small Business Administration (SBA) has completed a page-by-page, line-by-line review of all of its existing regulations to determine which might be revised or eliminated. The regulations proposed here would reorganize all but one of the regulations pertaining to procedures before the Office of Hearings and Appeals ("OHA") and consolidate them in one

part. In addition, the proposed regulations would clarify, simplify, and significantly shorten the existing regulations governing OHA. Finally, a number of substantive changes are proposed.

**DATES:** Comments must be submitted on or before December 27, 1995.

**ADDRESSES:** Written comments should be addressed to David R. Kohler, Regulatory Reform Team Leader, Attention: Part 134, U.S. Small Business Administration, 409 3rd Street, S.W., Suite 13, Washington, D.C. 20416.

**FOR FURTHER INFORMATION CONTACT:** Gary Fox, Chief Counsel for Special Litigation, at (202) 205-6643.

**SUPPLEMENTARY INFORMATION:** On March 4, 1995, President Clinton issued a memorandum to Federal agencies, directing them to simplify their regulations. In response to this directive, SBA has completed a page-by-page, line-by-line review of all of its existing regulations to determine which might be revised or eliminated. This proposed rule would consolidate all the existing regulations governing proceedings before OHA into part 134 with the exception of proceedings under the Program Fraud Civil Remedies Act, which would be covered in part 142 of this chapter. It would also clarify, simplify and revise the current rules, reorganize sections for ease of use, and eliminate unnecessary provisions.

As background, the following analysis discusses the anticipated effect of this proposed rule on SBA's current regulations.

The proposed rule would be divided into four subparts. Subpart A would contain general rules (currently subpart A). Subpart B (currently subpart B and §§ 124.210 and 124.211 (d) through (i)) would contain rules of practice applicable to all cases before OHA except size and SIC code appeals and proceedings under the Program Fraud Civil Remedies Act. Subpart C would contain the rules applicable to size and SIC code appeals (currently §§ 121.1701-1722). Subpart D would contain the rules for implementation of the Equal Access to Justice Act, currently contained in part 132. Proceedings covered by the Program Fraud Civil Remedies Act would continue to be contained in part 142 of this chapter.

A number of policy changes are also proposed. OHA's jurisdiction would be expanded to include cases brought under the Age Discrimination Act. At the same time, its jurisdiction would be narrowed to exclude contractor debarment and suspension proceedings, employee formal stage grievances,

arbitrations concerning labor agreements, and certain civil rights cases.

The service and filing requirements would be simplified considerably. Certification requirements and format requirements would be eliminated. The requirement that submissions be filed and served by certified or registered mail would be deleted, and the time limits for filing petitions and answers would be simplified and made uniform for all types of proceedings to the extent possible. In addition, the reviewing official on requests for review of all initial OHA decisions would be SBA's Administrator or his or her designee.

The proposed rule would expand the rights of parties in a number of ways. The rule would stay the time to answer a petition when a motion for summary decision is filed. The section on intervention would be broadened. The use of alternative dispute resolution procedures would be authorized where all parties consented. Finally, a number of time limits would be enlarged for the benefit of the public.

The proposed rule would also modify the rights of parties in a number of respects in the interests of efficiency and uniformity, and to conserve limited resources. For proceedings other than size and SIC code appeals, an oral hearing would not be granted unless there was a genuine dispute as to a material fact that could not be resolved except by the taking of testimony and the confrontation of witnesses. Oral hearings would not be permitted at all in SIC code appeals, and would be permitted in size appeals only under extraordinary circumstances. Discovery would be permitted in cases other than size, SIC code, and certain MED appeals only where a showing of good cause was made. No discovery would be permitted in size or SIC code appeals, and limited discovery would be permitted in certain MED appeals. There would no longer be an absolute right to review by OHA of a size determination. Instead, OHA would decide in its discretion whether to consider the appeal. Evidence would not be admitted in size appeals unless directed by the Judge. A size determination by an Area Office would be upheld unless the Judge found clear error of fact or law. Finally, the right to file motions for reconsideration of a Judge's decision in size and SIC code cases would be eliminated.

Subpart D would be reorganized, condensed, and rewritten in plain language. The text would be presented in a question and answer format for clarity and ease of use. Minimal substantive changes are proposed to clarify existing ambiguities and

eliminate obsolete directions or references.

#### Section-by-Section Analysis

The following is a section by section analysis of each provision of SBA's regulations that would be affected by this proposed rule:

Proposed § 134.101 would provide that the rules in this part would govern the conduct of cases before OHA.

Proposed § 134.102 would provide definitions applicable to all subparts within part 134. Many of the definitions in current § 134.2 would be shortened and simplified. Some definitions would be deleted as unnecessary; others would be added with the incorporation of portions of parts 121 and 124 into part 134. Minor language changes would also be made. The definition of "hearing" would clarify that a hearing may or may not include live testimony or argument. The definition of "Judge" would be expanded to include the Assistant Administrator for Hearings and Appeals ("AA/OHA") when acting in the capacity of an Administrative Judge. The definition of "pleading" would be narrowed to include only the petition, appeal, answer, or any supplement or amendment to these documents. The current rule defines "pleading" to include all submissions other than documentary or testimonial evidence.

Proposed § 134.103 would list proceedings over which OHA has jurisdiction and would amend current § 134.3. Paragraph (a) of the current rule would be deleted because contractor debarment and suspension proceedings can be more appropriately handled by the program office.

Current § 134.3(d) would be amended to delete all proceedings except those under the Rehabilitation Act of 1973 (29 U.S.C. § 794, as amended). Proceedings under the Age Discrimination Act (42 U.S.C. §§ 6101 *et seq.*) would be added. The remainder of the proceedings in current § 134.3(d) can be more appropriately conducted in other forums.

Current §§ 134.3(e) and (f) would be deleted. Thus, employee formal stage grievances and arbitrations arising under a pertinent labor agreement no longer would be under OHA's jurisdiction.

Proceedings to determine allowance of fees and expenses under the Equal Access to Justice Act (5 U.S.C. § 504), size and SIC code appeals, and proceedings pursuant to the Program Fraud Civil Remedies Act against persons who make false claims or statements would be added to the jurisdictional section.

Section 134.104 would restate in clear language the statutory limit on OHA's jurisdiction over certain types of MED appeals. Those limitations are currently set forth in § 124.210(d).

Proposed § 134.105 would restate in clear language the rules for computing time (current § 134.2(b)(2)) and modifying time limits (current § 134.4(a)). Paragraph (b) of current § 134.4 would be deleted.

Proposed § 134.201 would explain the scope of subpart B. Subpart B would cover all cases over which OHA has jurisdiction, except appeals from size determinations and SIC code designations, which would be covered in subpart C, and proceedings under the Program Fraud Civil Remedies Act, which would be covered in part 142.

Proposed § 134.202 would explain how to commence a case, and would provide revised time limits for filing petitions for various types of proceedings. The current regulation contains seven different rules pertaining to time limits for filing petitions, depending on the type of case. The proposed rule would provide that, with two exceptions, all petitions must be filed no later than 45 days from the date of service of the SBA action or determination to which the petition relates.

Proposed § 134.203 would specify the information required in a petition and provide that insufficient petitions may be dismissed. It would also incorporate the rules for filing petitions in certain MED appeals currently contained in § 124.210(b).

Proposed § 134.204 would amend the current rule on service and filing (§ 134.14). It would delete the requirement that multiple copies of pleadings be filed, and would add a provision permitting service and filing by facsimile transmission, United States express mail, or commercial delivery service. It is intended that "commercial delivery service" includes overnight or other expedited delivery by private business concerns. In cases where the filing is sent by first-class United States mail, it would change the date of filing with OHA from date of receipt to date of mailing, as determined by the postmark. It would also provide that in cases where the postmark is illegible or incomplete, the submission would be presumed to have been mailed five days prior to receipt. Finally, it would add a requirement that any filing by personal delivery or commercial delivery service must be made between the hours of 8:30 AM and 5:00 PM.

Current § 134.14(d), on waiver of rights to service, and current § 134.15, on format requirements, would be

deleted, as would the requirement that a certification be made as to the truth and accuracy of a filing. Under proposed § 134.209(b), a person's signature on a document would represent an express certification.

Proposed § 134.205 (currently § 134.11(c)) would be written in simpler language. The time limit for serving and filing a motion for a more definite statement would be increased from 15 to 20 days after service of a petition or order to show cause, so as to allow sufficient time in light of proposed § 134.204(e) pertaining to service. The rule would clarify that, where a motion for a more definite statement is filed, the Judge would establish the time for serving and filing an answer.

Proposed § 134.206, on answers, corresponds to § 134.12 of the current regulation. The current rule provides that answers for some types of cases must be filed within 30 days and others within 45 days after the filing of a petition. The proposed rule would provide that all answers must be filed no later than 45 days after the service of a petition, with the exception of debt collection proceedings for which a 30-day time limit would apply. The provision on notification to the Office of General Counsel of the docketing of a case would be deleted because it is an internal administrative procedure. Paragraph (d) of the current rule would be deleted. Proposed paragraphs (d) and (e) would clarify that SBA must submit the administrative record to OHA, and that the Judge can direct its compliance if necessary.

Proposed § 134.207, on amendments and supplemental pleadings, would not change the current rule substantially other than to simplify, shorten and reorganize it. It would limit the filing of amendments and supplements to pleadings in certain MED appeals to cases where a showing of good cause is made, with the Judge determining the time to answer. Current § 134.13(b), on conformance to evidence, would be deleted.

Proposed § 134.208, concerning representation in cases before OHA, would shorten the current section on appearances. Paragraphs (b) and (e) of current § 134.16 would be deleted as unnecessary practices. Paragraph (d) would also be eliminated since attorneys are presumed to know the ethical standards under which they must practice.

Proposed § 134.209 would adopt the signature requirements found elsewhere in the current rule, and would provide that the signing of a submission by a party or its counsel attests that the submission is true and is not being filed

for delay or harassment. This provision would replace the requirement in current § 134.15 requiring a separate, express certification.

Proposed § 134.210, on intervention, would eliminate the distinction between intervention as of right and discretionary intervention, and would broaden and simplify the current rule by adding a provision permitting intervention at the Judge's discretion to protect the moving party's interests. The proposed rule would provide SBA a right to intervene at any time until final decision.

Proposed § 134.211 would state in summary form the requirements of motion practice. Paragraph (d) of the current rule relating to the disposition of motions when the assigned Judge is unavailable would be deleted. The response time in the proposed rule would be enlarged to 20 days after the service of a motion to allow sufficient time in light of proposed § 134.204(e) pertaining to service.

Proposed § 134.212 would summarize the current provision on summary decision (current § 134.22) with some minor revisions. Current paragraph (d) relating to the content of the Judge's order when a motion is granted would be deleted. A new paragraph (d) would be added to stay the response time for filing an answer when a motion for summary decision has been filed, and to provide that the Judge would determine the response time for answering any claims remaining after a decision on the motion is rendered.

Proposed § 134.213 would require the establishment of good cause as a prerequisite to discovery in non-MED matters. Current § 124.210(h)(3)(i), governing discovery in certain MED program appeals, would be incorporated in this proposed rule. Current § 134.18(c), *Protective orders*, and current § 134.26, *Motions to compel*, would be summarized and incorporated in the proposed rule on discovery.

Proposed § 134.214, on subpoenas, would modify the current rule with respect to both application requirements and service. While the current rule permits a party to apply for a subpoena both orally on the record and *ex parte* by written application, the proposed rule would limit all subpoena requests to written applications. Service in the proposed rule would be limited to personal delivery only, eliminating service by certified mail. The proposed rule would require the subpoena and the affidavit of service to be filed with OHA within two days of service. The time for response to a motion to quash would be enlarged in the proposed rule. Finally, the rule would clarify that a

Judge can issue a subpoena on his or her own initiative.

Proposed § 134.215 would simplify the current procedure for interlocutory appeals by designating the AA/OHA or his or her designee as the reviewing official for purposes of all interlocutory appeals. The time for filing a motion to certify a ruling for an interlocutory appeal would be enlarged. The proposed rule also would make it clear that if the Judge declined to certify a ruling for interlocutory appeal, the affected party would be able to raise the adverse ruling in a subsequent request for review under § 134.228.

Proposed § 134.216 is new. This provision would permit the use of alternative dispute resolution techniques, such as arbitration and mediation, to resolve cases before OHA and would provide that, when such procedures are employed, the Judge would stay the proceedings before OHA as appropriate.

Proposed § 134.217 would shorten the current rule on settlements considerably. Cumulative information would be deleted and the requirements concerning the content of the agreement would be eliminated. The proposed rule would allow for partial settlements by eliminating paragraph (5) of the current rule. The remainder of the rule, while reorganized, would not be substantially revised.

Proposed § 134.218 would both shorten and modify current § 134.18 on Judges. It would require that an Administrative Law Judge be assigned to all proceedings under the Administrative Procedure Act. It would clarify that the AA/OHA could assign any other proceeding to himself or herself, provided that he or she is a duly licensed attorney. The duties and powers of the Judge would be stated broadly, clarifying that they can take such action as may be required to regulate proceedings and issue decisions. The proposed rule would eliminate paragraph (c) because protective orders are covered in proposed § 134.204(g), *Service and filing requirements*, and in § 134.213(d), *Discovery*. The proposed rule would also eliminate paragraph (e) on interference, which would be covered in proposed § 134.220, *Prohibition against ex parte communications*. The current paragraph on recusal would be rewritten in summary form. Paragraph (f), *Substitution of Judges*, would be eliminated because OHA's substitution procedures are consistent with court practice.

Proposed § 134.219 would modify the current rule on sanctions to clarify the type of conduct for which sanctions

might be imposed and to clarify that no sanctions imposing fees, costs, or monetary penalties can be ordered by the Judge. The rest of the rule would be more broadly stated, but its scope would not be substantively expanded.

Proposed § 134.220 would adopt the summary language of § 121.1715, now deleted, which also deals with the topic of *ex parte* communications. Rather than list the duties and obligations of a Judge as in current § 134.38, the proposed rule would incorporate by reference the Administrative Procedure Act, 5 U.S.C. § 557(d)(1). This statute contains explicit instructions for Judges who have been contacted *ex parte*. The proposed rule would reiterate current § 134.38 in emphasizing that prohibited communications may result in the imposition of sanctions.

Proposed § 134.221 would be shortened and rewritten in summary format instead of listing possible matters to be considered in a prehearing conference.

Proposed § 134.222, on oral hearings, would restate in clear language the intention of the current rule to leave oral hearings to judicial discretion. In the proposed rule, the Judge could permit an oral hearing in a non-MED matter only if he or she concluded that confrontation of witnesses was necessary to resolve a genuine dispute as to a material fact. The proposed rule would eliminate the provision in current § 134.19(a) restricting the time period within which a motion requesting an oral hearing may be submitted. However, current § 124.210(h)(3), which restricts the ability to request an oral hearing in certain MED program appeals, would be incorporated in § 134.222. Section 124.210(g) would also be modified and incorporated in this proposed rule. Selection of the location for all oral hearings would be committed to judicial discretion. Current §§ 124.211(e) and 124.211(h), relating to hearings on MED suspensions, would be incorporated in this part and expanded to provide that, for good cause, a Judge may waive the requirement that an oral hearing commence no more than 20 days after the ruling granting such hearing. Current paragraphs (c) and (d) of § 134.19, which track common federal court practices, would be eliminated, and current paragraphs (e)-(g) would be summarized for brevity's sake.

Proposed § 134.223, on evidence, would clarify OHA's use of the Federal Rules of Evidence as a general guide in its proceedings. Accordingly, paragraphs (b), (c), (d), (e), (f), and (g) of the current rule would be eliminated or shortened both for the sake of brevity,

and because these paragraphs track the federal rules. Current § 124.210(h)(1) would be revised and incorporated in paragraph (c) and in proposed § 134.224, *Standards for decision*. Current § 124.210(h)(3)(i) would be reorganized for clarity and moved to this section, insofar as it relates to the submission of evidence, and to § 134.211(b), insofar as it relates to discovery. Section 124.210(h)(2) would also be incorporated in paragraph (d) of the proposed rule, clarifying that the Judge would retain jurisdiction during any remand.

Proposed § 134.224, on standards for decision, would set forth the burden of proof in factual matters arising in cases before OHA. This language is currently set forth in § 134.31, *Contents of decisions*. It would also incorporate current § 124.210(h)(1), which provides the standard of review in cases involving MED program appeals. The scope of review would not change from the current rule.

Proposed § 134.225, dealing with the record, would be shortened considerably. The proposed rule would refer to the "record", instead of the "docket file", which would comport with the terminology used in the Administrative Procedure Act. Information relating to the internal administration of OHA would be deleted. The proposed rule would incorporate portions of current § 134.31, which would be deleted in its entirety. The remaining sections of the current rule on records would be eliminated or summarized for the sake of brevity.

Proposed § 134.226 would require that all decisions pertaining to the collection of debt owed to SBA and the United States under the Debt Collection Act of 1982 and part 140 of this chapter, must be rendered within 60 days after a petition is filed. Further it would incorporate, without modification, § 124.210(j), relating to decisions in certain MED proceedings, and would amend current § 124.211(i) to eliminate the requirement that a decision be rendered at the close of a suspension hearing, where one is held. It would also adopt the remaining portions of § 134.31, *Contents of decisions*.

Proposed § 134.227, on finality of decisions, would be rewritten to reflect the jurisdictional changes in § 134.103. Since OHA would no longer have jurisdiction over employee formal stage grievances or arbitrations involving labor agreements, current paragraphs 134.31(a)(1) and (a)(2) would be deleted. Paragraph (b) would be rewritten consistent with the jurisdictional changes in proposed § 134.103. Because OHA would no longer have jurisdiction

in contractor debarment and suspension proceedings, former paragraph (c) would also be eliminated. The remaining portions of paragraphs (a) and (b) would be rewritten for clarity.

Proposed § 134.228, on review of initial decisions, is based upon current § 134.34, but would permit the filing of a request for review directly with OHA. The term "agency reviewing official" would be eliminated. Upon a request for review, SBA's Administrator or his or her designee would review the initial decision and could set aside a decision if it were found to be based upon an erroneous finding of fact or an erroneous interpretation of case law, statute, regulation, or SBA policy. Time frames for filing a response to a petition for review would be enlarged.

Proposed § 134.229 would be rewritten for clarity.

Proposed § 134.301 would define the scope of subpart C. Subpart C would cover the rules on appeals from size determinations and SIC code designations currently found in §§ 121.1701 *et seq.* It would shorten and simplify current § 121.1701, deleting any reference to Regional Offices since authority to make size determinations has been transferred from Regional Offices to Government Contracting Area Offices.

Proposed § 134.302 corresponds to current § 121.1703 and would specify who may appeal a size determination or SIC code designation. This section would delete the reference to the Regional Administrator (since Regional Offices are no longer involved in size determinations), and clarify that the procuring agency contracting officer responsible for the relevant procurement has an appeal right.

Proposed § 134.303 would incorporate a policy decision to make the review of size appeals by OHA a matter of its discretion. This change would conserve limited resources and avoid the necessity of deciding cases where the regulation or case precedent is clear.

Proposed § 134.304 would specify the time limits for appeal, simplifying the current rule considerably. Time limits for appealing size determinations would now run from the date of service of the determination rather than from the date of receipt. The time periods for filing would be lengthened for certain types of appeals and shortened for others. Time limits for appeals from SIC code designations would run from the date the solicitation is issued. The current time limits for appeals of SIC code designations run backwards from the bid opening date or deadline for submitting proposals or quotations and are complex and difficult to use. The

rule on counting Saturdays, Sundays and holidays would be amended to conform to the rule for other OHA proceedings and would be incorporated in § 134.105. The remainder of the current section would be reorganized, but not substantively changed.

Proposed § 134.305 concerning the appeal petition would simplify current § 121.1706. A telefaxed notice would no longer need to be confirmed by next day mailing of a written notice. A signed certification as to the truth and accuracy of the appeal petition would no longer be required. In size appeals, the appellant would no longer be required to serve a copy of the appeal petition on all alleged affiliates of the concern whose size is at issue. The requirement would provide separate requirements for service of an SIC code appeal petition as opposed to a size appeal petition. A provision would be added clarifying that appeals may be dismissed if they do not contain all the required information.

Proposed § 134.306 would restate current § 121.1706(b) concerning transmission of the case file from the office that made the size determination to OHA.

Proposed § 134.307 would incorporate by reference proposed § 134.204. The rule for service and filing of submissions for size and SIC code appeals would be the same as that for filing petitions under subpart B, with the rule in subpart B incorporated by reference. The requirement in the current rule (§ 121.1712) that service be made by certified or registered mail would be deleted to ease the burden on the public. The current requirement that an express certification be made as to the truth and accuracy of any submission to OHA would be deleted. Under proposed § 134.209 (incorporated by reference), any person signing a document attests to its truth and accuracy. Proposed § 134.307 would incorporate by reference a rule on determining the date of service or filing. Proposed § 134.105 would incorporate the rule on modification of time limits in current § 121.1712(e).

Proposed § 134.308 is new and would provide that evidence not presented to the SBA official whose size determination is being appealed would only be considered when ordered by the Judge. A new provision would also be added to provide that the Judge could draw adverse inferences against parties who do not submit evidence in their possession when directed to do so.

Proposed § 134.309, concerning responses to the appeal petition, corresponds to current § 121.1708. It would be reorganized for clarity, would

enlarge the time to file a response to an appeal from 5 to 10 days, and would clarify that replies to responses would not be permitted unless directed by the Judge.

Proposed § 134.310 on discovery would incorporate the current policy of OHA not to permit discovery in either size or SIC code proceedings.

Proposed § 134.311 would provide that oral hearings not be held in SIC code appeals, and be held in size appeals only under exceptional circumstances. In SIC code cases, short time frames make the use of oral hearings impracticable. Moreover, there is rarely a need to confront witnesses in an SIC code appeal. Under exceptional circumstances, oral hearings may be appropriate in size determination appeals. In such instances, the proceedings would be conducted in accordance with those rules in subpart B deemed appropriate by the Judge.

Proposed § 134.312 would incorporate by reference certain paragraphs in § 134.223 for cases where evidence is admitted. There is no separate rule on evidence in the current regulations relating to appeals from size determinations and SIC code designations.

Proposed § 134.313 would incorporate by reference certain other provisions in subpart B. The rules for amendments to pleadings, representation, signature, intervention, motions, subpoenas, Judges, sanctions, and the prohibition against *ex parte* communications, would be identical to those for other proceedings before OHA. For the sake of brevity and simplicity, these sections would be incorporated by reference in subpart C rather than repeated verbatim.

The proposed rule on amendments to pleadings does not appear in the current rule and would permit parties to amend pleadings if permitted by the Judge. The proposed rule on representations does not appear in the current rules and would limit the types of persons who could represent parties in proceedings before OHA. The current rule on intervention (§ 121.1709) would be broadened to permit OHA to allow an interested person to intervene if the Judge determines that the person's participation in the proceedings would likely assist in the efficient, prompt, and fair determination of the case. The proposed rule on signatures would include a provision that by signing a submission a person attests to its truth and accuracy. This would replace the requirement in current § 121.1712(d) that an express certification be made as to the truth and accuracy of a document. The proposed section on motions is new and would clarify what is required

when filing a motion in these proceedings. The section on Judges would be shortened considerably. The current rule on Judges (§ 121.1713) lists all the various powers of a Judge in OHA. The proposed rule would state the duties and powers of the Judge in broad terms. The current section on *ex parte* communications (§ 121.1715) would not be substantially changed except that the Administrative Procedure Act would be cited with regard to a Judge's duty to disclose *ex parte* communications. The provision on sanctions (current § 121.1713(p)) would be shortened, and the list of the types of sanctions that could be imposed would be deleted.

Proposed § 134.314 would provide that the standard of review in size and SIC code appeals would be whether the determination was based on clear error of law or fact. In cases where new evidence was submitted, it is recognized that clear error of law or fact could be found as a result of such new evidence.

Proposed § 134.315, concerning the record, would incorporate by reference certain paragraphs in § 134.225, and would add a sentence providing that the contents of the record would also include the file submitted to OHA by the Area Office and any materials submitted by the contracting officer.

Proposed § 134.316, on the decision, corresponds to current § 121.1720. The current rule would be shortened considerably. References to hearings and post-hearing procedures would be eliminated. The statement concerning oral notification of the ultimate determination would be eliminated. Judges may provide oral notice of the decision as a matter of practice under their powers as Judges.

Proposed § 134.317 is new and would clarify that OHA's jurisdiction would terminate upon the issuance of the decision.

Proposed § 134.318 would inform the public that the case file would be returned to the transmitting Area Office upon termination of OHA's jurisdiction.

A number of sections in the current rules would be deleted or incorporated elsewhere. The definitions in current § 121.1702 would be incorporated in proposed § 134.102, the definitional section for all of part 134. Current § 121.1704 would be incorporated in proposed § 134.204 on service and filing requirements. Current § 121.1710 would be substantially incorporated in proposed § 134.225. Current § 121.1711 would be deleted since the assignment of a Judge is an internal administrative procedure. The right to request reconsideration in current § 121.1712 would be eliminated in order to streamline the appellate process.

Current § 121.1716, on subpoenas, would be deleted since proposed § 134.313 would incorporate by reference proposed § 134.214. Current § 121.1717, concerning *in camera* orders, would be deleted since proposed § 134.307 would incorporate by reference proposed § 134.204(g), and proposed § 134.315 would incorporate by reference proposed § 134.225(b). Current § 121.1719, concerning post-hearing procedures, would be eliminated since oral hearings would no longer be held in SIC code appeals, and only rarely in size appeals. Current § 121.1722, concerning the delegation of authority when a Judge is not available, would be deleted since it is an internal procedure and is a matter of general practice in administrative and judicial forums.

Proposed § 134.401 corresponds to existing § 132.101. There are no substantive changes in the proposed section. This section, and the sections which follow, are organized in question and answer format to make the information more accessible.

Current § 132.102 which discusses the sunset of the Equal Access to Justice Act (the "Act") would be deleted because Public Law 99-80 enacted August 5, 1984 reauthorized the Act.

Proposed § 134.402 describes generally the types of proceedings under which you may apply for reimbursement. This proposed section corresponds to current §§ 132.101, 132.103, and 132.105.

Proposed § 134.403 corresponds to existing § 132.103. The proposed section defines which types of proceedings conducted by OHA are "agency adversary adjudications" covered by the Act. The proposed section would revise the current section to be consistent with § 134.103 in subpart A of this rule, which lists the types of proceedings in which OHA has jurisdiction. Note that only a few categories of OHA proceedings qualify as "agency adversary adjudications": proceedings concerning the revocation or suspension of SBIC licensees, cease and desist orders, and the removal or suspension of SBIC directors and officers; proceedings under the Debt Collection Act of 1982; and MED eligibility appeals relating to admission, termination, graduation, and waiver denials under § 124.317.

Proposed § 134.404 is new. It describes generally the type of benefits you may claim.

Proposed § 134.405 corresponds to existing § 132.105. The material is revised in the proposed rule to provide clarification of certain terms used in the current section, such as "position of the

agency". The proposed section would incorporate the clarified definition added to the Act in the 1984 amendment at 5 U.S.C. § 504(b)(1)(E) and in the amended Model Rule at 1 C.F.R. § 315.105(a). The definition now includes the position taken by the agency in the administrative proceeding, as well as the agency's position in the underlying action which triggered the administrative proceeding. The proposed section would also provide that although no presumption arises that SBA's position was not substantially justified simply because it did not prevail in a proceeding, nonetheless, upon the assertion that the position of SBA was not substantially justified, SBA would be required to establish that its position was reasonable in fact and law.

Proposed § 134.406(a) clarifies the definition of eligible party found in current § 132.104. The current section does not define "party" but instead refers to the definition in 5 U.S.C. § 551(3). This reference is confusing because the definition of "party" in that statute could include federal agencies. Federal agencies are not parties eligible for reimbursement under the Act. The proposed new section actually defines an eligible party in a manner consistent with the Act. Proposed § 134.406(b) corresponds to existing § 132.104(h).

Proposed § 134.407 corresponds to existing §§ 132.104(b), (c), (d) and (e), which describe eligibility criteria. The proposed section summarizes the material on eligibility in the form of a chart and revises it to reflect the amendment to the Act which increased the net worth eligibility ceiling.

Proposed § 134.408 corresponds to existing subsections 132.104(f) and (g). The reorganized material summarizes all the special rules for calculating eligibility in one section.

Proposed § 134.409 describes the difference between fee and expense.

Proposed § 134.410 describes the limitations on reimbursement of professional fees and expenses found in current §§ 132.201 and 132.202. That portion of the proposed section pertaining to fees presents the information in more succinct form, but does not substantively revise it. That portion of the proposed section relating to expenses revises the current rule so that it will be consistent with the proposed rule relating to fees. The current section would not otherwise be substantively revised.

Proposed § 134.411 corresponds to existing § 132.301. The proposed section reorganizes material relating to applications and conforms the service and filing requirements to the

requirements of § 134.204. The lengthy requirements of the current section would be revised and summarized for ease of reference. A chart would be added to clarify what each type of party must attach as exhibits to the petition.

Proposed § 134.412 corresponds to existing § 132.302. The proposed section reorganizes material relating to net worth exhibits and presents it in simplified form. The text is significantly condensed. Redundant information is deleted.

Proposed § 134.413 corresponds to existing § 132.303. The proposed section sets forth the requirements of the current rule in a clearer format for ease of reference. Additional specificity is provided in the proposed section respecting the submission of statements or invoices for expenses. This language was added so that the requirements for expense invoices would be consistent with the requirements for fee statements.

Proposed § 134.414 corresponds to existing §§ 132.301 and 132.402. The proposed section reorganizes material relating to the filing deadline of applications. The proposed section also effectuates the stay language in the Act, at 5 U.S.C. § 504(a)(2), which provides for a stay of award requests if the SBA or another party appeals the underlying decision. The Act requires award requests to be stayed until a final unreviewable decision is rendered in the underlying adjudication. This information is not contained in the current SBA regulations although it is both in the Act and in the Model Rule for Implementation of the Equal Access to Justice Act at 1 CFR § 315.204.

Proposed § 134.415 incorporates the procedural requirements of subpart B by reference.

Proposed § 134.416 corresponds to existing §§ 132.402(a) and 132.403. The proposed section reorganizes the material relating to the ALJ's decision. The current text would be condensed and summarized in the proposed rule, but not otherwise revised.

Proposed § 134.417 corresponds to existing § 132.404. The proposed section clarifies the avenues available to an applicant to seek review of an ALJ's decision on an award, and the time frames which must be observed. The proposed section adds new language to current § 134.404 as to what type of SBA decision is a "determination" under the Act for purposes of judicial review.

Proposed § 134.418 corresponds to existing § 132.501. The proposed section would add the SBA's address for Financial Operations to expedite payment of awards but would not otherwise revise the section.

*Compliance With Executive Orders 12612, 12778, and 12866, the Regulatory Flexibility Act (5 U.S.C. §§ 601, et seq.), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)*

SBA certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of Executive Order 12866 or the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.* This rule would reorganize and simplify the rules governing procedures before SBA's Office of Hearings and Appeals. Contracting opportunities and financial assistance for small business would not be affected by this proposed rule. Therefore, it is not likely to have an annual economic effect of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the United States economy.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA certifies that this proposed rule, if adopted in final form, would contain no new reporting or record keeping requirements.

For purposes of Executive Order 12612, SBA certifies that this rule would not have any federalism implications warranting the preparation of a Federalism Assessment.

For purposes of Executive Order 12778, SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in section 2 of that Order.

List of Subjects

*13 CFR Part 132,*

Claims, Equal Access to Justice, Lawyers.

*13 CFR Part 134*

Administrative practice and procedure, Organization and functions (Government agencies).

For the above reasons, and under the authority of 15 U.S.C. 634(b)(6), SBA proposes to amend 13 CFR Chapter I as follows:

1. Part 134 would be revised to read as follows:

**PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS**

**Subpart A—General Rules**

Sec.

- 134.101 Scope of the rules in this part 134.
- 134.102 Definitions used in this part 134.
- 134.103 Jurisdiction of OHA.
- 134.104 Limitation on the jurisdiction of OHA.
- 134.105 Rules applicable to time periods provided in this part 134.

**Subpart B—Rules of Practice for Most Cases**

- 134.201 Scope of the rules in subpart B.
- 134.202 Commencement of cases.
- 134.203 The petition.
- 134.204 Service and filing requirements.
- 134.205 Motion for a more definite statement.
- 134.206 The answer.
- 134.207 Amendments and supplemental pleadings.
- 134.208 Representation in cases before OHA.
- 134.209 Requirement of signature.
- 134.210 Intervention.
- 134.211 Motions.
- 134.212 Summary decision.
- 134.213 Discovery.
- 134.214 Subpoenas.
- 134.215 Interlocutory appeals.
- 134.216 Alternative dispute resolution procedures.
- 134.217 Settlement.
- 134.218 Judges.
- 134.219 Sanctions.
- 134.220 Prohibition against *ex parte* communications.
- 134.221 Prehearing conferences.
- 134.222 Oral hearing.
- 134.223 Evidence.
- 134.224 Standards for decision.
- 134.225 The record.
- 134.226 The decision.
- 134.227 Finality of decisions.
- 134.228 Review of initial decisions.
- 134.229 Termination of jurisdiction.

**Subpart C—Rules of Practice for Appeals From Size Determinations and SIC Code Designations**

- 134.301 Scope of the rules in subpart C.
- 134.302 Who may appeal.
- 134.303 No absolute right to an appeal from a size determination.
- 134.304 Commencement of appeals from size determinations and SIC code designations.
- 134.305 The appeal petition.
- 134.306 Transmission of the case file.
- 134.307 Service and filing requirements.
- 134.308 Limitation on the submission of new evidence in appeals from size determinations.
- 134.309 Response to an appeal petition.
- 134.310 Discovery.
- 134.311 Oral hearings.
- 134.312 Evidence.
- 134.313 Applicability of subpart B provisions.
- 134.314 Standard of review.
- 134.315 The record.
- 134.316 The decision.
- 134.317 Termination of jurisdiction.
- 134.318 Return of the case file.

**Subpart D—Implementation of the Equal Access to Justice Act**

- 134.401 What is the purpose of this subpart?
- 134.402 Under what circumstances may I apply for reimbursement?
- 134.403 What is an agency adversary adjudication?
- 134.404 What benefits may I claim?
- 134.405 Under what circumstances are fees and expenses reimbursable?

- 134.406 Who is eligible for possible reimbursement?
  - 134.407 How do I know which eligibility requirement applies to me?
  - 134.408 What are the special rules for calculating net worth and number of employees?
  - 134.409 What is the difference between a fee and an expense?
  - 134.410 Are there limitations on reimbursement for fees and expenses?
  - 134.411 What should I include in my application for an award?
  - 134.412 What must a net worth exhibit contain?
  - 134.413 What documentation do I need for fees and expenses?
  - 134.414 What deadlines apply to my petition for an award and where do I send it?
  - 134.415 How will proceedings relating to my application for fees and expenses be conducted?
  - 134.416 How will I know if I receive an award?
  - 134.417 May I seek review of the ALJ's decision on my award?
  - 134.418 How are awards paid?
- Authority: 5 U.S.C. 504; 15 U.S.C. 634(b)(6) and 637(a).

**Subpart A—General Rules**

**§ 134.101 Scope of the rules in this part 134.**

The rules in this part 134 govern the conduct of all proceedings before OHA except those governed by part 142 of this chapter.

**§ 134.102 Definitions used in this part 134.**

As used in this part:

*AA/OHA* means the Assistant Administrator for OHA.

*Address* means the primary home or business address of a person or entity, including the street location or postal box number, city or town, state, and postal zip code.

*Area Office* means a Government Contracting Area Office or a Disaster Area Office of the Small Business Administration.

*Day* means a calendar day, unless a Judge specifies otherwise.

*Hearing* means the presentation and consideration of argument and evidence. A hearing may or may not include live testimony or argument.

*Judge* means an Administrative Law Judge or an Administrative Judge of OHA, or the AA/OHA when he or she acts in the capacity of an Administrative Judge.

*OHA* means the Office of Hearings and Appeals.

*Party* means the petitioner, respondent, or intervenor.

*Person* means an individual, or a partnership, association, corporation, or other business entity.

*Petition* means a written complaint, a written notice of appeal from an SBA



determination, or a written request for the initiation of proceedings before OHA.

*Petitioner* means any person or governmental agency which has brought a proceeding before OHA.

*Pleading* means a petition, an order to show cause commencing a case, a notice of appeal, or an answer, as well as any amendment or supplement to those documents.

*Respondent* means any person or governmental agency against which a case has been brought before OHA.

*SBA* means the United States Small Business Administration.

*SIC code* means Standard Industrial Classification code.

*Size determination* means a formal size determination made by an Area Office.

#### **§ 134.103 Jurisdiction of OHA.**

OHA has authority to conduct proceedings in the following types of cases:

(a) The revocation or suspension of Small Business Investment Company licenses, cease and desist orders, and the removal or suspension of directors and officers of licensees, under the Small Business Investment Act of 1958, 15 U.S.C. 681 *et seq.* and part 107 of this chapter;

(b) Alleged violations of the Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.* and part 112, subparts A and B, of this chapter, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, as amended, and part 112, subpart C, of this chapter;

(c) The revocation of the privilege of any applicant or agent to conduct business with SBA under the Small Business Act, 15 U.S.C. 634 and 642 and part 103 of this chapter;

(d) The eligibility of, or preferred or certified status of, any bank or non-bank lender to continue to participate in SBA loan programs under the Small Business Act, 15 U.S.C. 634 *et seq.* and part 120 of this chapter;

(e) The suspension or termination of surety bond program participants under 15 U.S.C. 694a *et seq.* and part 115 of this chapter;

(f) The rights, privileges, or obligations of development companies under sections 501, 502, 503, and 504 of the Small Business Investment Act of 1958, 15 U.S.C. 695 *et seq.* and part 120, subpart H, of this chapter;

(g) Allowance of fees and expenses under the Equal Access to Justice Act, 5 U.S.C. 504 and subpart D of this part;

(h) Debarment from appearance before the SBA because of post-employment restrictions under 18 U.S.C. 207 and part 105 of this chapter;

(i) Collection of debts owed to SBA and the United States under the Debt Collection Act of 1982 and part 140 of this chapter;

(j) Appeals from the following SBA determinations involving the MED program under the Small Business Act, 15 U.S.C. 637 and part 124 of this chapter:

(1) Denial of program admission based solely on a negative finding as to social disadvantage, economic disadvantage, ownership or control; program termination; program graduation; or denial of a waiver of the requirement to perform to completion a MED contract; and

(2) Program suspension;

(k) Appeals from size determinations and SIC code designations under part 121 of this chapter;

(l) The imposition of civil penalties and assessments against persons who make false claims or statements to SBA under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801–3812 and part 142 of this chapter; and

(m) Any other hearing, determination, or appeal proceeding referred to OHA by the Administrator of SBA.

#### **§ 134.104 Limitation on the jurisdiction of OHA.**

A Judge considering a MED program appeal arising under § 134.103(j)(1) of this part must not accept jurisdiction if:

(a) The appeal does not allege facts that, if true, would warrant reversal or modification of the determination; or

(b) The appeal is not filed on time and in accordance with the requirements of this part; or

(c) The matter has been decided or is the subject of a pending case before a court.

#### **§ 134.105 Rules applicable to time periods provided in this part 134.**

(a) *Computing time.* In computing time, the day from which the time is computed is not counted. The last day of the time period is counted, unless it is a Saturday, Sunday, or Federal holiday, in which event the next business day is counted.

(b) *Modification of time limits.* At the Judge's discretion, or upon the motion of a party showing good cause, the Judge may modify any of the time limits set forth in this part, other than those established by statute and those governing when a case may be commenced. However, any motion to extend a time limit must be filed and served before the expiration of that time limit.

#### **Subpart B—Rules of Practice for Most Cases**

##### **§ 134.201 Scope of the rules in subpart B.**

The rules of practice in subpart B of this part apply to all proceedings over which OHA has jurisdiction, except for appeals from size determinations and SIC code designations and proceedings governed by part 142 of this chapter.

##### **§ 134.202 Commencement of cases.**

(a) *Commencement of a case by a person.* A case may be commenced by a person by filing a written petition within the following time periods:

(1) Except as otherwise provided by this paragraph, no later than 45 days from the date of service of the SBA action or determination to which the petition relates;

(2) In the case of debt collection proceedings under part 140 of this chapter, no later than 15 days after receipt of a notice of indebtedness and intention to collect such debt by salary or administrative offset;

(3) In the case of applications for an award of fees pursuant to subpart D of this part, no later than 30 days after the decision to which it applies becomes final.

(b) *Commencement of a case by SBA.* A case may be commenced by SBA by filing a written order to show cause.

##### **§ 134.203 The petition.**

(a) *Required contents of a petition.* A petition must contain the following information:

(1) The basis of OHA's jurisdiction over the case;

(2) A clear and concise statement of the factual basis of the case and, if the case is a MED program appeal arising under § 134.103(j)(1) of this part, the reasons why the determination is alleged to be arbitrary, capricious, or contrary to law;

(3) The relief being sought; and

(4) The name, address, telephone number, and signature of the petitioner or its attorney.

(b) *Dismissal of insufficient petitions.* A petition which does not contain all of the information required by paragraph (a) of this section may be dismissed, with or without prejudice, by the Judge at his or her own initiative, or upon motion of the respondent.

##### **§ 134.204 Service and filing requirements.**

(a) *Service.* Each party is responsible for the service of its pleadings and other submissions upon all other parties or their attorneys. Unless otherwise ordered by the Judge, service is made by providing each party, or its attorney, with a copy of the pleading or other submission by personal delivery, first-



class United States mail, United States express mail, facsimile transmission, or commercial delivery service. If service is to be by first-class United States mail or United States express mail, it must be accomplished as follows:

(1) By mailing to a party's last-known residence or business address if it has not yet appeared in the case, or by mailing to the address of a party which has appeared as shown in its submission;

(2) If a party has appeared in the case through an attorney, by mailing to the address of the attorney shown in the party's submission or in a notice of appearance;

(3) If to SBA, unless an attorney is specified in SBA's submissions to OHA, by mailing to: Office of General Counsel, Small Business Administration, 409 Third Street, S.W.—Seventh Floor, Washington, D.C. 20416.

(b) *Filing.* (1) All pleadings and other submissions must be filed with OHA by personal delivery, first-class United States mail, United States express mail, facsimile transmission, or commercial delivery service. Filing may only be accomplished at the following address: Office of Hearings and Appeals, Small Business Administration, 409 Third Street, S.W.—Mail Code 2441, Washington, D.C. 20416.

(2) If filing is to be by personal delivery or commercial delivery service, such filing must be accomplished between the hours of 8:30 a.m. and 5:00 p.m. If filing is to be by facsimile transmission, the telephone number to be used may be obtained by calling OHA in Washington, D.C.

(c) *Number of copies which must be filed.* Only the original of a pleading or other submission must be filed with OHA. In the case of a document offered as evidence, an authenticated copy may be filed instead of the original.

(d) *Certificate of service.* A signed certificate stating how and when service was made on all parties must be attached to each pleading or other submission filed with OHA.

(e) *Date of service and filing.* Unless otherwise specified by the Judge, the date of service or filing is as follows:

(1) In the case of service or filing by facsimile transmission, the date of transmission;

(2) In the case of service or filing by first-class United States mail, the date of postmark; and

(3) In the case of service or filing by personal delivery, United States express mail, or commercial delivery service, the date of receipt.

(f) *Presumption relating to the date of service or filing by first-class United States mail.* Where the determination of

the date of service or filing is dependent upon the date of postmark, and the postmark is illegible or incomplete, there will be a rebuttable presumption that the postmark was dated five days prior to the date of receipt.

(g) *Treatment of confidential information.* Any information in pleadings or other submissions that is believed by the submitting party to constitute proprietary or confidential information need not be served upon other parties so long as the deletions are clearly identified and generally described in the documents which are served. Upon motion, the Judge may direct that the withheld information be provided to other parties, subject to any appropriate protective order.

#### **§ 134.205 Motion for a more definite statement.**

(a) *Procedure.* No later than 20 days after service of the petition or order to show cause, the respondent may serve and file a motion requesting a more definite statement by the petitioner of particular allegations in the petition or order to show cause identified by the respondent. Where the respondent makes a reasonable showing that a response cannot be made in the absence of further detail by the petitioner, the Judge will issue an order directing the petitioner to serve and file a more definite statement.

(b) *Stay.* The serving and filing of a motion for a more definite statement stays the time for serving and filing an answer. In the order determining the motion for a more definite statement, the Judge will establish the time for serving and filing an answer.

#### **§ 134.206 The answer.**

(a) *Time due.* A respondent must serve and file an answer within 45 days after the service of a petition or order to show cause, except that debt collection proceeding answers are due within 30 days.

(b) *Required contents of an answer.* The answer must contain the following:

(1) An admission or denial of each of the factual allegations contained in the petition or order to show cause, or a statement that the respondent denies knowledge or information sufficient to determine the truth of a particular allegation;

(2) Any affirmative defenses; and

(3) The name, address, telephone number, and signature of the respondent or its attorney.

(c) *Failure to deny.* Allegations in the petition or order to show cause which are not answered in accordance with paragraph (b)(1) of this section will be deemed admitted unless injustice would occur.

(d) *Submission of the written administrative record.* Upon an appeal from an SBA determination concerning the MED program, SBA must serve and file the written administrative record pertaining to that determination within the same time period applicable to the service and filing of its answer. If SBA fails to serve and file the written administrative record within the appropriate time period, the Judge will issue an order directing SBA to serve and file the administrative record by a specified date.

(e) *Default.* If the respondent fails to serve and file an answer within the time period set forth in paragraph (a) of this section, or within any extended time period granted by the Judge, that failure will constitute a default. Following such a default, the respondent will be prohibited from participating further in the case, except to serve and file the written administrative record in accordance with paragraph (d) of this section. The Judge will then proceed to issue a decision.

#### **§ 134.207 Amendments and supplemental pleadings.**

(a) *Amendment of pleadings.* Upon motion, and under terms needed to avoid prejudice to any non-moving party, the Judge may permit the service and filing of amendments to pleadings. However, an amendment will not be permitted if it would cause unreasonable delay in the determination of the matter.

(b) *Supplemental pleadings.* Upon motion, and under terms needed to avoid prejudice to any non-moving party, the Judge may permit the service and filing of a supplemental pleading setting forth relevant transactions or occurrences that have taken place since the filing of the original pleading.

(c) *Limitation applicable to MED program appeals arising under § 134.103(j)(1) of this part.* In MED program appeals arising under § 134.103(j)(1) of this part, amendments to pleadings and supplemental pleadings will be permitted by the Judge only upon a showing of good cause.

(d) *Answer to a petition or order to show cause which has been amended or supplemented.* In an order permitting the serving and filing of an amended or supplemented petition or order to show cause, the Judge will establish the time for serving and filing an answer.

#### **§ 134.208 Representation in cases before OHA.**

(a) *Representation pro se or by an attorney.* A party to a case before OHA may represent itself, or be represented by a duly licensed attorney. A member

of a partnership may represent the partnership, and an officer may represent a corporation, trust, or association.

(b) *Notice of appearance.* An attorney for a party who did not appear on behalf of that party in the party's first filing with OHA, must serve and file a written notice of appearance.

(c) *Withdrawal of appearance.* An attorney seeking to withdraw from a case must serve and file a motion for the withdrawal of his or her appearance.

#### **§ 134.209 Requirement of signature.**

(a) *Requirement of signature.* Every written submission to OHA, other than evidence, must be signed by the party filing that submission, or by the party's attorney.

(b) *Meaning of signature.* By signing a submission to OHA, a party or its attorney attests that the statements and allegations in that submission are true to the best of its knowledge, and that the submission is not being filed for the purpose of delay or harassment.

#### **§ 134.210 Intervention.**

(a) *Intervention by SBA.* SBA may intervene as of right at any time in any case until final decision.

(b) *Intervention by interested persons.* Any individual, partnership, association, corporation, trust, or governmental agency may move to intervene at any time until final decision by serving and filing a motion to intervene containing a statement of the movant's interest in the case and the necessity for intervention, to protect such interest. The Judge may grant leave to intervene upon such terms as he or she deems appropriate.

#### **§ 134.211 Motions.**

(a) *Contents.* All motions must state the relief being requested, as well as the grounds and any authority for that relief.

(b) *Response.* No later than 20 days after the service of a motion, all non-moving parties must serve and file a response or be deemed to have consented to the relief sought. Unless the Judge directs otherwise, the moving party will have no right to reply to a response, nor will oral argument be heard on the motion.

(c) *Service of written orders.* OHA will serve upon all parties any written order issued in response to a motion.

#### **§ 134.212 Summary decision.**

(a) *Grounds.* A party may move for summary decision at any time as to all, or any portion of, the case, on the grounds that there is no genuine issue as to any material fact, and that the

moving party is entitled to a decision in its favor as a matter of law.

(b) *Contents of motion.* The motion must include a statement of the material facts believed not to be disputed, and relevant law. Supporting affidavits may also be included.

(c) *Cross-motions.* In its response to a motion for summary decision, a party may cross-move for summary decision in its own favor. The initial moving party may serve and file a response to any cross-motion for summary decision within 20 days after the service of that cross-motion.

(d) *Stay.* A motion for summary decision stays the time to answer. If appropriate, the Judge will establish the time for serving and filing an answer in the order determining the motion for summary decision.

#### **§ 134.213 Discovery.**

(a) *Discovery in cases other than those involving MED program appeals arising under § 134.103(j)(1) of this part.* In cases other than those involving MED program appeals arising under § 134.103(j)(1) of this part, a party may obtain discovery only upon motion, and for good cause shown.

(b) *Discovery in MED program appeals arising under § 134.103(j)(1) of this part.* In MED program appeals arising under § 134.103(j)(1) of this part, discovery will be permitted only upon motion, and only if it is determined by the Judge that the requesting party has made a substantial showing, based upon credible evidence, and not mere allegation, that the SBA determination in question may have resulted from bad faith or improper behavior. Any permitted discovery will be limited to facts relating to the alleged bad faith or improper behavior asserted by the party seeking discovery.

(c) *Forms of permissible discovery.* The forms of discovery which a Judge can order under paragraphs (a) and (b) of this section include requests for admissions, requests for production of documents, interrogatories, and depositions.

(d) *Limitations upon discovery.* Discovery may be limited in accordance with the terms of a protective order. Further, privileged information and irrelevant issues or facts will not be subject to discovery.

(e) *Motions available to resolve a discovery dispute.* If a dispute should arise between the parties over a particular discovery request, the party seeking discovery may serve and file a motion to compel discovery. Discovery may be opposed on the grounds of harassment, needless embarrassment,

irrelevance, undue burden or expense, privilege, or confidentiality.

#### **§ 134.214 Subpoenas.**

(a) *Availability of subpoenas.* At the request of a party, or upon his or her own initiative, a Judge may issue a subpoena requiring a witness to appear and testify, or to produce particular documents, at a specified time and place.

(b) *Requests for the issuance of a subpoena.* A request for the issuance of a subpoena must be written, served upon all parties, and filed. The request must clearly identify the witness and any documents to be subpoenaed, and must set forth the relevance of the testimony or documents sought.

(c) *Service.* A subpoena may only be served by personal delivery. The individual making service shall prepare an affidavit stating the date, time, and place of the service. The party which obtained the subpoena must serve upon all other parties, and file with OHA, a copy of the subpoena and affidavit of service within 2 days after service is made.

(d) *Motion to quash.* A motion to limit or quash a subpoena must be served and filed within 10 days after service of the subpoena, or by the return date of the subpoena, whichever date comes first. Any response to the motion must be served and filed within 10 days after service of the motion, unless a shorter time is specified by the Judge. No oral argument will be heard on the motion unless the Judge directs otherwise.

#### **§ 134.215 Interlocutory appeals.**

(a) *General rules.* A motion for leave to take an interlocutory appeal from a Judge's ruling will not be entertained in those proceedings in which OHA issues final decisions. In all other cases, an interlocutory appeal will be permitted only if, upon motion by a party, or upon the Judge's own initiative, the Judge certifies that his or her ruling raises a question which is immediately appealable. Interlocutory appeals will be decided by the AA/OHA or a designee.

(b) *Motion for certification.* A party must serve and file a motion for certification no later than 20 days after issuance of the ruling to which the motion applies. A denial of the motion does not preclude objections to the ruling in any subsequent request for review of an initial decision.

(c) *Basis for certification.* The Judge will certify a ruling for interlocutory appeal only if he or she determines that:

(1) The ruling involves an important question of law or policy about which

there is substantial ground for a difference of opinion; and

(2) An interlocutory appeal will materially expedite completion of the case, or denial of an interlocutory appeal would cause undue hardship to a party.

(d) *Stay of proceedings.* A stay of the proceedings, while an interlocutory appeal is pending, will be at the discretion of the Judge.

#### **§ 134.216 Alternative dispute resolution procedures.**

At any time during the pendency of a case, the parties may submit a joint motion requesting that the Judge permit the use of alternative dispute resolution procedures to assist in resolving the matter. If the motion is granted, the Judge will also stay the proceedings before OHA, in whole or in part, as he or she deems appropriate, pending the outcome of the alternative dispute resolution procedures.

#### **§ 134.217 Settlement.**

(a) *Contents of a Settlement Agreement.* At any time during the pendency of a case, the parties may submit a settlement agreement, signed by all settling parties, to the Judge.

(b) *Admissibility.* Settlement negotiations, and rejected settlement agreements, are not admissible into evidence.

#### **§ 134.218 Judges.**

(a) *Assignment of Judges.* The AA/OHA will assign all cases subject to the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, to an Administrative Law Judge. The AA/OHA will assign all other cases before OHA to either an Administrative Law Judge or an Administrative Judge, or, if the AA/OHA is a duly licensed attorney, to himself or herself.

(b) *Authority of a Judge.* Except as otherwise limited by this part, or by statute or other regulation, a Judge has the authority to take all appropriate action to ensure the efficient, prompt, and fair determination of a case, including, but not limited to, the authority to administer oaths and affirmations and to subpoena and examine witnesses.

(c) *Recusal.* Upon the motion of a party, or upon the Judge's own initiative, a Judge will promptly recuse himself or herself from further participation in a case whenever disqualification is appropriate due to conflict of interest, bias, or some other significant reason. A denial of a motion for recusal may be immediately appealed to the AA/OHA, or to the Administrative Law Judge if the AA/

OHA is the Judge, but that appeal will not stay proceedings in the case.

#### **§ 134.219 Sanctions.**

A Judge may impose appropriate sanctions, except for fees, costs, or monetary penalties, which he or she deems necessary to serve the ends of justice, if a party or its attorney:

(a) Fails to comply with an order of the Judge;

(b) Fails to comply with the rules set forth in this part;

(c) Acts in bad faith or for purposes of delay or harassment;

(d) Submits false statements knowingly, recklessly, or with deliberate disregard for the truth; or

(e) Otherwise acts in an unethical or disruptive manner.

#### **§ 134.220 Prohibition against ex parte communications.**

No person shall consult or communicate with a Judge concerning any fact, question of law, or SBA policy relevant to a case before that Judge except on prior notice to all parties, and with the opportunity for all parties to participate. In the event of such prohibited consultation or communication, the Judge will disclose the occurrence in accordance with the Administrative Procedure Act, 5 U.S.C. 557(d)(1), and may impose such sanctions as he or she deems appropriate.

#### **§ 134.221 Prehearing conferences.**

Prior to a hearing, the Judge, at his or her own initiative, or upon the motion of any party, may direct the parties or their attorneys to appear, by telephone or in person, in order to consider any matter which may assist in the efficient, prompt, and fair determination of the case. The conference may be recorded verbatim at the discretion of the Judge, and, if so, a party may purchase a transcript, at its own expense, from the recording service.

#### **§ 134.222 Oral hearing.**

(a) *Availability of an oral hearing.* At his or her own initiative, or upon the motion of any party, the Judge may order an oral hearing if he or she concludes that there is a genuine dispute as to a material fact that cannot be resolved except by the taking of testimony and the confrontation of witnesses. However, in MED program appeals arising under § 134.103(j)(1) of this part, an oral hearing will not be permitted unless the Judge determines that there has been a substantial showing, based upon credible evidence, that the SBA determination in question may have resulted from bad faith or improper behavior.

(b) *Place and time of oral hearings.*

The place and time of oral hearings is within the discretion of the Judge, who shall give due regard to the necessity and convenience of the parties, their attorneys, and witnesses. The Judge may direct that an oral hearing be conducted by telephone. In cases arising from a MED program suspension determination, any oral hearing granted by the Judge must commence as soon as possible, but not more than 20 days after the ruling granting the oral hearing except upon a showing of good cause.

(c) *Public access to oral hearings.* Unless otherwise ordered by the Judge, all oral hearings are public.

(d) *Payment of witnesses subpoenaed to attend oral hearings.* A party which obtains a witness's presence at an oral hearing by subpoena, must pay to that witness the fees and mileage costs to which the witness would be entitled in the Federal Courts.

(e) *Recording of an oral hearing.* Oral hearings will be recorded verbatim. A transcript of a recording may be purchased by a party, at its own expense, from the recording service.

#### **§ 134.223 Evidence.**

(a) *Applicability of the Federal Rules of Evidence.* Unless contrary to a particular rule in this part, or it is otherwise ordered by the Judge, the Federal Rules of Evidence will be used as a general guide in all cases before OHA.

(b) *Admissibility of hearsay.* Hearsay evidence is admissible if it is deemed by the Judge to be relevant and reliable.

(c) *Certain decisions based upon the written administrative record.* Unless it is determined by the Judge, upon motion, that there has been a substantial showing, based upon credible evidence, that the SBA determination in question may have resulted from bad faith or improper behavior, any MED program appeal arising under § 134.103(j)(1) of this part will be decided solely on a review of the written administrative record.

(d) *Remand for further consideration.* If, upon a MED program appeal arising under § 134.103(j)(1) of this part, the Judge determines that, due to the absence in the written administrative record of the reasons upon which the determination in question was based, the administrative record is insufficient to decide whether the determination is arbitrary, capricious, or contrary to law, the Judge will remand the case for further consideration. The Judge will retain jurisdiction of the matter during the period of remand.

**§ 134.224 Standards for decision.**

The decision of a Judge in cases other than those involving MED program appeals arising under § 134.103(j)(1) of this part will be based upon a preponderance of the evidence. In MED program appeals arising under § 134.103(j)(1) of this part, the determination will be sustained unless it is found to be arbitrary, capricious, or contrary to law.

**§ 134.225 The record.**

(a) *Contents of record.* The record of a case before OHA will consist of all pleadings, motions, and other non-evidentiary submissions, all admitted evidence, all orders and decisions, and any transcripts of proceedings in the case.

(b) *Public access.* Except for information subject to a protective order, proprietary or confidential information withheld in accordance with this part, or any other information which is excluded from disclosure by law or regulation, the record will be available at OHA for public inspection during normal business hours. Copies of the documents available for public inspection may be obtained by the public upon payment of any duplication charges.

(c) *Closure of the pre-decisional record.* The Judge will set the date upon which the pre-decisional record of the case will be closed, and after which no additional evidence or argument will be accepted.

**§ 134.226 The decision.**

(a) *Contents.* Following closure of the record, the Judge will issue a decision containing findings of fact and conclusions of relevant law, reasons for such findings and conclusions, and any relief ordered. The contents of the record will constitute the exclusive basis for a decision.

(b) *Time limit for certain decisions.* Decisions pertaining to the collection of debts owed to SBA and the United States under the Debt Collection Act of 1982 and part 140 of this chapter must be rendered within 60 days after a petition is filed. Decisions pertaining to MED program appeals arising under § 134.103(j)(1) of this part will be rendered, insofar as practicable, within 90 days after a petition is filed.

(c) *Service.* OHA will serve a copy of all written decisions on:

(1) Each party, or, if represented by counsel, on its counsel; and

(2) SBA's General Counsel, or his or her designee, if SBA is not a party.

**§ 134.227 Finality of decisions.**

(a) *Final decisions.* A decision on the merits shall be a final decision, upon issuance, in the following cases:

(1) Proceedings concerning the collection of debts owed to SBA and the United States, under the Debt Collection Act of 1982 and part 140 of this chapter; and

(2) Appeals from determinations relating to SBA's MED program.

(b) *Initial decisions.* All decisions on the merits other than those set forth in paragraph (a) of this section are initial decisions. However, unless a request for review is filed pursuant to § 134.228(a), an initial decision shall become the final decision of SBA 30 days after its issuance.

**§ 134.228 Review of initial decisions.**

(a) *Request for review.* Within 30 days after the service of an initial decision, any party, or SBA's Office of General Counsel, may serve and file with OHA a request for review. A request for review must set forth the filing party's specific objections to the initial decision, and any alleged support for those objections in the record, or in case law, statute, regulation, or SBA policy. A party must serve its request for review upon all other parties and upon SBA's Office of General Counsel.

(b) *Response to a request for review.* Within 20 days after the service of a request for review, any party so served, or SBA's Office of General Counsel, may serve and file with OHA a response. A party must serve its response upon all other parties and upon SBA's Office of General Counsel.

(c) *Transfer of the record to the Administrator for review.* Upon receipt of all possible responses, but in no case later than 30 days after the filing of a request for review, OHA will transfer the record of the case to the Administrator. The Administrator, or his or her designee, will then review the record.

(d) *Standard of review.* Upon review, the Administrator, or his or her designee, will sustain the initial decision unless it is based on an erroneous finding of fact or an erroneous interpretation or application of case law, statute, regulation, or SBA policy.

(e) *Order.* After consideration of the record, the Administrator, or his or her designee, will:

(1) Affirm, reverse, or modify the initial decision, which determination will become the final decision of the SBA upon issuance; or

(2) Remand the initial decision to the Judge for appropriate further proceedings.

**§ 134.229 Termination of jurisdiction.**

The jurisdiction of OHA will terminate upon the issuance of a decision by a Judge resolving all material issues of fact and law unless the case is subsequently remanded for appropriate further proceedings, pursuant to § 134.228(e)(2) of this part.

**Subpart C—Rules of Practice for Appeals From Size Determinations and SIC Code Designations****§ 134.301 Scope of the rules in subpart C.**

The rules of practice in subpart C of this part apply to all appeals to OHA from:

(a) Formal size determinations made by an SBA Government Contracting Area Office, under part 121 of this chapter, or by a Disaster Area Office, in connection with applications for disaster loans; and

(b) SIC code designations, pursuant to part 121 of this chapter.

**§ 134.302 Who may appeal.**

Appeals from size determinations and SIC code designations may be filed with OHA by the following, as applicable:

(a) Any person adversely affected by a size determination;

(b) Any person adversely affected by a SIC code designation. However, with respect to a MED contract, only the Associate Administrator for Minority Enterprise Development may appeal a SIC code designation;

(c) The Associate or Assistant Administrator for the SBA program involved, through SBA's Office of General Counsel; and

(d) The procuring agency contracting officer responsible for the procurement affected by a size determination.

**§ 134.303 No absolute right to an appeal from a size determination.**

It is within the discretion of the Judge whether to accept an appeal from a size determination. If the Judge decides not to consider such an appeal, he or she will issue an order denying review, and specifying the reasons for the decision.

**§ 134.304 Commencement of appeals from size determinations and SIC code designations.**

(a) *When appeals must be commenced.* Appeals from size determinations and SIC code designations must be commenced by serving and filing a notice of appeal as follows:

(1) If appeal is from a size determination in a pending procurement or pending Government property sale, then the notice of appeal must be served and filed within 15 days after service of the size determination;

(2) If appeal is from a size determination other than one in a pending procurement or pending Government property sale, then the notice of appeal must be served and filed within 30 days after service of the size determination;

(3) If appeal is from a SIC code designation, then the notice of appeal must be served and filed within 10 days after the issuance of the initial invitation for bids or initial request for proposals or quotations.

(b) *Untimely appeals.* An untimely appeal will be dismissed. However, an appeal which is untimely under paragraph (a)(1) of this section, with respect to a pending procurement or sale, may, if timely under paragraph (a)(2) of this section, proceed with respect to future procurements or sales.

#### **§ 134.305 The appeal petition.**

(a) *Form.* There is no required format for an appeal petition. However, it must include the following information:

(1) The Area Office which issued the size determination, or the contracting office which designated the SIC code;

(2) The solicitation or contract number, and the name, address, and telephone number of the contracting officer;

(3) A full and specific statement as to why the size determination or SIC code designation is alleged to be in error, together with argument supporting such allegations; and

(4) The name, address, telephone number, and signature of the appellant or its attorney.

(b) *Who must be served with a size determination appeal petition.* The appellant must serve the appeal petition upon each of the following:

(1) The SBA official who issued the size determination;

(2) The contracting officer responsible for the procurement affected by a size determination;

(3) The business concern whose size status is at issue;

(4) All persons who filed protests; and

(5) SBA's Office of General Counsel.

(c) *Who must be served with a SIC code appeal petition.* The appellant must serve the contracting officer who made the SIC code designation.

(d) *Certificate of service.* The appellant must attach to the appeal petition a signed certificate identifying each person or governmental agency which was served with the notice of appeal, and how and when each of those persons or governmental agencies was served.

(e) *Dismissal of insufficient appeal petitions.* An appeal petition which does not contain all of the information

required in paragraph (a) of this section may be dismissed, with or without prejudice, by the Judge at his or her own initiative, or upon motion of a respondent.

#### **§ 134.306 Transmission of the case file.**

Upon receipt of an appeal petition pertaining to a size determination, the Area Office which issued the size determination must immediately send to OHA the entire case file relating to that determination. Upon receipt of an appeal petition pertaining to a SIC code designation, the contracting officer who designated the SIC code must immediately send to OHA the solicitation relating to that designation.

#### **§ 134.307 Service and filing requirements.**

The provisions of § 134.204 of this part apply to the service and filing of all pleadings and other submissions permitted under this subpart.

#### **§ 134.308 Limitation on the submission of new evidence in appeals from size determinations.**

(a) *When new evidence may be submitted.* Evidence not previously presented to the Area Office which issued the size determination being appealed will not be considered by a Judge unless:

(1) The Judge, on his or her own initiative, orders the submission of such evidence; or

(2) A motion is served and filed establishing good cause for the submission of such evidence.

(b) *Adverse inference resulting from the failure to comply with an order to submit evidence.* If the submission of evidence is ordered by a Judge, and the party in possession of that evidence does not submit it, the Judge may draw adverse inferences against that party.

#### **§ 134.309 Response to an appeal petition.**

(a) *Who may respond.* Any person served with an appeal petition, or any other interested person, may serve and file a response supporting or opposing the appeal. The response should present argument.

(b) *Time limits for serving and filing a response.* Unless otherwise specified by the Judge, a respondent must serve and file a response within 10 days after service of the appeal petition upon it.

(c) *Who must be served.* The respondent must serve its response upon the appellant and upon each of the persons identified in the certificate of service attached to the appeal petition pursuant to § 134.305 of this part.

(d) *Reply to a response.* No reply to a response will be permitted unless the Judge directs otherwise.

#### **§ 134.310 Discovery.**

Discovery will not be permitted in appeals from size determinations or SIC code designations.

#### **§ 134.311 Oral hearings.**

Oral hearings will not be held in appeals from SIC code designations, and will be held in appeals from size determinations only upon a finding by the Judge of extraordinary circumstances. If such an oral hearing is ordered, the proceeding shall be conducted in accordance with those rules of subpart B of this part as the Judge deems appropriate.

#### **§ 134.312 Evidence.**

To the extent the rules in this subpart permit the submission of evidence, the provisions of §§ 134.223 (a) and (b) apply.

#### **§ 134.313 Applicability of subpart B provisions.**

The following sections from subpart B apply to an appeal under this subpart: § 134.207(a) (pertaining to amendments to pleadings); § 134.208 (Representation in cases before OHA); § 134.209 (Requirement of signature); § 134.210 (Intervention); § 134.211 (Motions); § 134.214 (Subpoenas); § 134.218 (Judges); § 134.219 (Sanctions); and § 134.220 (Prohibition against *ex parte* communications).

#### **§ 134.314 Standard of review.**

The standard of review is whether the size determination or SIC code designation was based on clear error of fact or law.

#### **§ 134.315 The record.**

Where relevant, the provisions of §§ 134.225 (a), (b), and (c) apply. In an appeal under this subpart, the contents of the record also include the case file or solicitation submitted to OHA in accordance with § 134.306.

#### **§ 134.316 The decision.**

(a) *Contents.* Following closure of the record, the Judge will issue a decision containing findings of fact and conclusions of law, reasons for such findings and conclusions, and any relief ordered.

(b) *Finality of the decision.* The decision is the final decision of the SBA and becomes effective upon issuance.

(c) *Service.* OHA will serve a copy of all written decisions on:

(1) Each party, or, if represented by counsel, on its counsel; and

(2) SBA's General Counsel, or his or her designee, if SBA is not a party.

**§ 134.317 Termination of jurisdiction.**

The jurisdiction of OHA will terminate upon the issuance of a decision.

**§ 134.318 Return of the case file.**

Upon termination of jurisdiction, OHA will return the case file to the transmitting Area Office. The remainder of the record will be retained by OHA.

**Subpart D—Implementation of the Equal Access to Justice Act****§ 134.401 What is the purpose of this subpart?**

The Equal Access to Justice Act, 5 U.S.C. 504, establishes procedures by which prevailing parties in certain administrative proceedings may apply for reimbursement of fees and other expenses. Eligible parties may receive awards when they prevail over SBA, unless SBA's position in the proceeding was "substantially justified" or special circumstances make an award unjust. The rules of this subpart which follow explain which OHA proceedings are covered, who may be eligible for an award of fees and expenses, and how to apply for such an award.

**§ 134.402 Under what circumstances may I apply for reimbursement?**

You may apply for reimbursement under this subpart if you meet the eligibility requirements in § 134.406 and you prevail over SBA in a final decision in:

- (1) The type of administrative proceeding which qualifies as an "agency adversary adjudication" under § 134.403; or
- (2) An ancillary or subsidiary issue in that administrative proceeding that is sufficiently significant and discrete to merit treatment as a separate unit; or

(3) A matter which the agency has designated in its order for hearing as an "agency adversary adjudication" under 5 U.S.C. 554.

**§ 134.403 What is an agency adversary adjudication?**

For purposes of this subpart, agency adversary adjudications are administrative proceedings before OHA which involve SBA as a party and which are required to be conducted by an Administrative Law Judge ("ALJ"). These adjudications ("administrative proceedings") include those proceedings listed in §§ 134.103(a), 134.103(i), and 134.103(j)(1), but do not include other OHA proceedings such as those listed in § 134.103(k). In order for an administrative proceeding to qualify, SBA must have been represented by counsel or by another representative who enters an appearance and participates in the proceeding.

**§ 134.404 What benefits may I claim?**

You may seek reimbursement for certain reasonable fees and expenses incurred in prosecuting or defending a claim in an administrative proceeding.

**§ 134.405 Under what circumstances are fees and expenses reimbursable?**

(a) If you are a prevailing eligible party, you may receive an award for reasonable fees and expenses unless the position of the agency in the proceeding is found by the ALJ to be "substantially justified", or special circumstances exist which make an award unjust. The "position of the agency" includes not only the position taken by SBA in the administrative proceeding, but also the position which it took in the action which led to the administrative proceeding. No presumption arises that SBA's position was not substantially

justified simply because it did not prevail in a proceeding. However, upon your assertion that the position of SBA was not substantially justified, SBA will be required to establish that its position was reasonable in fact and law.

(b) The ALJ may reduce or deny an award for reimbursement, if you have unreasonably protracted the administrative proceeding or if other circumstances would make the award unjust.

(c) Awards for fees and expenses incurred before the date on which an administrative proceeding was initiated are allowable only if you can demonstrate that they were reasonably incurred in preparation for the proceeding.

**§ 134.406 Who is eligible for possible reimbursement?**

(a) You are eligible for possible reimbursement if:

- (1) You are an individual, sole proprietorship, partnership, corporation, association, organization, or unit of local government; and
- (2) You are identified as a party in a petition or order to show cause; and
- (3) You are the prevailing party; and
- (4) You meet certain net worth and employee eligibility requirements set forth in § 134.407.

(b) You are not eligible for possible reimbursement if you participated in the administrative proceeding only on behalf of persons or entities that are ineligible.

**§ 134.407 How do I know which eligibility requirement applies to me?**

Follow this chart to determine your eligibility. You should calculate your net worth and the number of your employees as of the date the administrative proceeding was initiated.

| If your participation in the proceeding was:                                                                                        | Eligibility requirements:                                                                 |
|-------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------|
| For individual or personal interests .....                                                                                          | Personal net worth may not exceed 2 million dollars.                                      |
| As sole owner of an unincorporated business .....                                                                                   | Personal net worth may not exceed 7 million dollars<br>and<br>No more than 500 employees. |
| As a partnership, corporation, association, organization, or unit of local government.                                              | Business net worth may not exceed 7 million dollars<br>and<br>No more than 500 employees. |
| As a charitable or other tax exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)). | No net worth limitations<br>and<br>No more than 500 employees.                            |
| As a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).                    | No net worth limitations<br>and<br>No more than 500 employees.                            |

**§ 134.408 What are the special rules for calculating net worth and number of employees?**

(a) Your net worth must include the value of any assets disposed of for the

purpose of meeting an eligibility standard, and must exclude any obligation incurred for that purpose. Transfers of assets, or obligations

incurred, for less than reasonably equivalent value will be presumed to have been made for the purpose of meeting an eligibility standard.

(b) If you are a sole owner of an unincorporated business, or a partnership, corporation, association, organization, or unit of local government, your net worth must include the net worth of all of your affiliates. "Affiliates" are corporations or other business entities which directly or indirectly own or control a majority of the voting shares or other ownership interests in the applicant concern. "Affiliates" are also corporations or other business entities in which the applicant concern directly or indirectly owns or controls a majority of the voting shares or other ownership interests.

(c) Your employees include all those persons regularly working for you at the time the administrative proceeding was initiated, whether or not they were at work on that date. Part-time employees must be included on a proportional basis. You must include the employees of all your affiliates in your total number of employees.

**§ 134.409 What is the difference between a fee and an expense?**

A fee is a charge to you for the professional services of attorneys, agents, or expert witnesses rendered in connection with your case. An expense is the cost to you of any study, analysis, engineering report, test, project, or similar matter prepared in connection with your case.

**§ 134.410 Are there limitations on reimbursement for fees and expenses?**

(a) Awards will be calculated on the basis of fees and expenses actually

incurred. If services were provided by one or more of your employees, or were made available to you free, you may not seek an award for those services. If services were provided at a reduced rate, fees and expenses will be calculated at that reduced rate.

(b) In determining the reasonableness of the fees for attorneys, agents or expert witnesses, the ALJ will consider:

(1) That provider's customary fee for like services;

(2) The prevailing rate for similar services in the community in which that provider ordinarily performs services;

(3) The time actually spent in representing you; and

(4) The time reasonably spent in light of the difficulty and complexity of the issues.

(c) An award for the fees of an attorney or agent may not exceed \$75 per hour, and an award for the fees of an expert witness may not exceed \$25 per hour, regardless of the rate charged.

(d) An award for the reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on your behalf may not exceed the prevailing rate payable for similar services, and you may be reimbursed only if the study or other matter was necessary to the preparation of your case.

**§ 134.411 What should I include in my application for an award?**

(a) Your application must be in the form of a written petition which is served and filed in accordance with

§ 134.204 of this part. It must contain the following information:

(1) A statement that OHA has jurisdiction over the case pursuant to § 134.103(g);

(2) An identifying reference to the administrative proceeding for which you are seeking an award;

(3) A statement that you have prevailed, and a list of each issue in which you claim the position of SBA was not substantially justified;

(4) Whether you are an individual, sole proprietorship, partnership, corporation, association, organization, or unit of local government;

(5) Your net worth and number of employees as of the date the administrative proceeding was initiated, or a statement that one or both of these eligibility requirements do not apply to you;

(6) The amount you are seeking;

(7) A description of any affiliates (as that term is defined in § 134.408), or a statement that no affiliates exist;

(8) A statement that the petition and any attached statements and exhibits are true and complete to the best of your knowledge and that you understand a false statement on these documents is a felony punishable by fine and imprisonment under 18 U.S.C. 1001; and

(9) Your name, address, and telephone number, and the signature of you or your attorney.

(b) You should follow this chart to determine which attachments must be included with your petition:

| Party                                                                                                                                  | Required attachment                                                                                                                                                                                                                                                                                                                                         |
|----------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Individual .....                                                                                                                       | Net worth exhibit and<br>Statement of fees and/or expenses for the services of each provider for which you seek reimbursement.                                                                                                                                                                                                                              |
| Sole owner of unincorporated business .....<br>or<br>Partnership, corporation, association, organization, or unit of local government. | Net worth exhibit and<br>Statement of fees and/or expenses for the services of each provider for which you seek reimbursement.                                                                                                                                                                                                                              |
| Organization qualified as tax exempt under section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)).                       | Copy of a ruling by the Internal Revenue Service that you qualify as a 501(c)(3) organization<br>or<br>Statement that you were listed in the current edition of IRS Bulletin 78 as of the date the administrative proceeding was initiated,<br>and<br>Statement of fees and/or expenses for the services of each provider for which you seek reimbursement. |
| Tax exempt religious organization not required to obtain a ruling from the Internal Revenue Service on its exempt status.              | Description of your organization and the basis for your belief you are exempt<br>and<br>Statement of fees and/or expenses for the services of each provider for which you seek reimbursement.                                                                                                                                                               |
| Cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).                            | Copy of your charter or articles of incorporation<br>and<br>Copy of your bylaws and<br>Statement of fees and expenses for the services of each provider for which you seek reimbursement.                                                                                                                                                                   |



**§ 134.412 What must a net worth exhibit contain?**

(a) A net worth exhibit may be in any format, but it must:

- (1) List all assets and liabilities for you and each affiliate in detail sufficient to show your eligibility;
- (2) Aggregate net worth for you and all affiliates; and
- (3) Describe any transfers of assets or obligations incurred by you or your affiliates within one year of the initiation of the administrative proceeding which have reduced your total net worth below the eligibility ceiling, or state that no such transfers occurred.

(b) The net worth exhibit must be filed with your petition, but will not be part of the public record of the proceeding. Further, in accordance with the provisions of § 134.204(g), you do not have to serve your net worth exhibit on other parties.

**§ 134.413 What documentation do I need for fees and expenses?**

You must submit a separate itemized statement or invoice for the services of each provider for which you seek reimbursement. All expenses claimed must be verifiable. Each separate statement or invoice must contain:

- (a) The hours worked in connection with the proceeding by each individual providing a billable service;
- (b) A description of the specific services performed by these individuals;
- (c) The rate at which fees were computed for each individual working on your case;
- (d) Where applicable, a description of any study, analysis, report, test, project, or other similar matter prepared in connection with your case;
- (e) The total charged by the provider on that statement or invoice; and
- (f) The provider's verification that the statement or invoice is true to the best of his or her knowledge and that he or she understands that a false statement is punishable by fine and imprisonment under 18 U.S.C. 1001.

**§ 134.414 What deadlines apply to my petition for an award and where do I send it?**

After you have prevailed in an administrative proceeding or in a discrete unit thereof, you must serve, and file with OHA, your written petition for an award, and its attachments, no later than 30 days after the decision in the administrative proceeding becomes final under § 134.227 of this part. The deadline for filing a petition for an award may not be modified. If SBA or another party requests review of the decision in the underlying

administrative proceeding, your request for an award for fees and expenses may still be filed, but it will not be considered by the ALJ until a final decision is rendered.

**§ 134.415 How will proceedings relating to my application for fees and expenses be conducted?**

Proceedings will be conducted in accordance with the provisions in subpart B of this part.

**§ 134.416 How will I know if I receive an award?**

The ALJ will issue an initial decision on the merits of your request for an award which will become final in 30 days unless a request for review is filed under § 134.228 of this part. The decision will include findings on your eligibility, on whether SBA's position was substantially justified, and on the reasonableness of the amount you requested. Where applicable, there will also be findings on whether you have unduly protracted the proceedings or whether other circumstances make an award unjust, and an explanation of the reason for the difference, if any, between the amount requested and the amount awarded. If you have sought an award against more than one federal agency in the administrative proceeding, the decision will allocate responsibility for payment among the agencies with appropriate explanation.

**§ 134.417 May I seek review of the ALJ's decision on my award?**

You may request review of the ALJ's decision on your award by filing a request for review in accordance with § 134.228. A request for review must be filed within 30 days of service of the ALJ's initial decision. You may also seek judicial review of the decision of the ALJ as provided in 5 U.S.C. 504(c)(2). For purposes of judicial review, the initial decision of the ALJ is not an appealable "determination" under that statute until it becomes a final decision as provided in § 134.227. Judicial review of the ALJ's decision on your award must be requested within 30 days of the final decision.

**§ 134.418 How are awards paid?**

If you are seeking payment of an award, you must submit a copy of the ALJ's final award to SBA along with your certification that you are not seeking review of the ALJ's decision in the award proceeding. The request must be sent to the Chief Financial Officer, Office of Financial Operations, SBA, P.O. Box 205, Denver, CO 80201-0205. SBA will pay you the amount awarded within 60 days of receipt of your request unless it is notified that you or another

party has sought judicial review of the ALJ's decision on the award or of the decision in the underlying administrative proceeding.

**PART 132—[REMOVED]**

2. Part 132 is hereby removed.

Dated: November 13, 1995.

Philip Lader,  
Administrator.

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**13 CFR Part 142****Program Fraud Civil Remedies Act Regulations**

**AGENCY:** Small Business Administration.

**ACTION:** Proposed rule.

**SUMMARY:** In response to President Clinton's government-wide regulatory reform initiative, the Small Business Administration (SBA) has completed a page-by-page, line-by-line review of all of its existing regulations to determine which might be revised or eliminated. This proposed rule would renumber, reorganize, condense and rewrite in plain language the existing regulation implementing the program "Fraud Civil Remedies Act of 1986". The goal of the plain language style is to eliminate cumbersome wording, redundancies and ambiguities. The goal of the reorganization and revision is to make this part consistent in practice and procedure with other parts of this title and to clarify requirements under this regulation and applicable statutes of the United States.

**DATES:** Comments must be submitted on or before December 27, 1995.

**ADDRESSES:** Written comments should be addressed to David R. Kohler, Regulatory Reform Team Leader, (142) Small Business Administration, 409 3rd Street, S.W., Suite 13, Washington, D.C. 20416.

**FOR FURTHER INFORMATION CONTACT:** Cheri Wolff, Chief Counsel for General Litigation; Office of General Counsel, at (202) 205-6643.

**SUPPLEMENTARY INFORMATION:** On March 4, 1995, President Clinton issued a Memorandum to each federal agency, directing them to simplify their regulations. In response to this directive, SBA has completed a page-by-page, line-by-line review of all of its existing regulations to determine which might be revised or eliminated. This proposed rule reorganizes and partially redrafts former provisions for clarity and user-friendliness. Extensive renumbering was necessary for